



Montana Department of Natural Resources & Conservation
Trust Land Management Division
Forest Management Program

September 11, 2014

REPORT TO THE ENVIRONMENTAL QUALITY COUNCIL

Endangered Species Act ruling on State Forests

- In 2003, the Montana Department of Natural Resources and Conservation (DNRC) initiated the process to apply for an **Incidental Take Permit (Permit)** under the Endangered Species Act (ESA). A Permit allows for the incidental take of ESA listed species during otherwise lawful activities (i.e. forest management).
- A **Habitat Conservation Plan (HCP)** is a required component of the application for a Permit and outlines the species and geographic that will be covered, the Permit term, and conservation strategies the applicant will follow to avoid, minimize, or mitigate incidental take to the species. For nearly 8 years, DNRC and USFWS cooperatively developed conservation strategies for the Montana DNRC Forested State Trust Lands HCP. The DNRC HCP covers:
 - Forest management activities on 548,000 acres of forested state trust land for a 50-year Permit term starting in 2012.
 - Grizzly bear, Canada lynx, and bull trout (currently listed species) as well as westlope cutthroat trout and Columbia redband trout (not yet listed, but likely to be listed during the Permit term).
- **Anticipated Benefits of the HCP:**
 - Provides long term legal assurances that DNRC forest management practices would be in compliance with the ESA as they pertain to the covered species.
 - Provides DNRC with flexibility in managing grizzly bear security core in the Stillwater State Forest.
 - Ensures long-term conservation needs of the HCP species.
- In **February 2012**, DNRC received a Permit from the USFWS and has since been implementing the HCP.
- In March 2013, EarthJustice, on behalf of Friends of the Wild Swan, Montana Environmental Information Center, and Natural Resource Defense Council, filed a complaint against the

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USFWS – soon after, the Board of Land Commissioners and DNRC joined as Intervenor Defendants. Court proceedings and briefings took place in the first half of 2014.

- On August 21, 2014, Judge Molloy issued his **Order on Friends of the Wild Swan et al. v. USFWS, Montana Board of Land Commissioners, and DNRC**.
- **Original Challenge:** Plaintiffs challenged the HCP and associated Permit on 5 separate grounds: 1) that the required mitigation was not the maximum practicable by DNRC for either bull trout or grizzly bears; 2) the no-jeopardy determination for bull trout was arbitrary and unlawful; 3) the USFWS failed to take a "hard look" at environmental impacts under NEPA; 4) the USFWS did not consider a reasonable range of alternatives; and 5) the USFWS did not consider the cumulative impacts of climate change on bull trout.
- **In Judge Molloy's order, all but one of these points were denied to the plaintiffs.** Plaintiffs' motion was granted pertaining to grizzly bear mitigation, and he found that the USFWS did not demonstrate adequately that DNRC had mitigated impacts to grizzly bears to the "Maximum Extent Practicable" when adopting a new management strategy for the Stillwater and Coal Creek State Forests (Stillwater Block).
- DNRC understands that the **HCP and Permit are valid on the rest of the HCP Project Area** (~510,000 acres) and are carrying on with activities as normal and will continue to conduct timber sales accordingly.
- Explanation of point granted to the plaintiffs:
 - **Prior to the HCP**, DNRC had conservation strategies for grizzly bears primarily focused in 2 areas – the Stillwater Block and the Swan River State Forest. Through several years of cooperative development with the USFWS, DNRC agreed to expand the area under which conservation strategies for grizzly bears would apply – nearly 145,000 additional acres of state trust lands now have conservation strategies for grizzly bears under the HCP. Part of this expansion of conservation also included developing a new management plan for the Stillwater Block. The new approach replaced the core concept with an approach **very similar to the Swan Valley Grizzly Bear Conservation Agreement** - creating 4 individual subzones totaling approximately 16,000 acres that would have allowed 4 years of active commercial timber management followed by 8 years of mandatory rest from commercial activities.
 - **Grizzly Bear Security Core:** Prior to the HCP, the DNRC implemented 'security core' approach for grizzly bears – whereby certain activities were limited on approximately 38,000 acres of 'core'. Grizzly bear security core is defined as areas that must be greater than 0.3 miles from restricted or open roads that can

be used for motorized public access, and or, administrative or commercial access by an agency. Any form of motorized activities in security core areas is prohibited from April 1 through November 15 each year. The 38,000 acres is not one contiguous block, but rather several discrete areas ranging in size from 70 to 14,000 acres. Some of these blocks are adjacent to USFS security core lands. Although wintertime forest management activities are allowed, because of the geographic location, elevation, and terrain, activities are largely not feasible due to the amount of snow the area receives in the winter. Therefore, this area became defacto off limits to any type of forest management.

- **Activities Enjoined:** Judge Molloy further ordered that the HCP remain in effect while this matter is on remand with the exception of the portion of the plan that abandoned grizzly bear security core in the Stillwater Block. Thus, he enjoined DNRC from implementing the portion of the HCP in the Stillwater Block that would affect any of the security core areas managed prior to the adoption of the HCP in 2012.
- **How is this order affecting the DNRC Forest Management Program?** This order required the immediate shutdown of active timber harvest operations in security core – affecting partially 4 timber sales and entirely 2 timber sales currently under contract. We are still assessing the effects, but we estimate that at least 8-10 MMbf have been affected by this ruling which translates into over \$1 million to the trust beneficiaries. The following purchasers are affected:
 - F.H. Stoltze – Chuck Roady and Paul McKenzie principals
 - Upper Whitefish (1.6 MMbf) is about 20% affected
 - Mystery Fish (5 MMbf) is almost entirely affected
 - Mill Creek Timber Inc. – John Andrews principal
 - Fish Bull Face (1.5 MMbf) is about 70% affected
 - Ewing Central (5.6 MMbf) is about 60% affected
 - Tough Go Logging – James Stupac principal
 - Morane Cyclone (3.8 MMbf) is almost entirely affected
 - Ureco Inc. – Dave and Jake Sheff principals
 - Lower Herrig (5.3 MMbf) is almost entirely affected
- **DNRC has directed all purchasers, operators, and staff to suspend mechanized and motorized activities within the Stillwater Core on the Stillwater Block.** This includes the suspension of active timber harvesting, precommercial thinning, site preparation, and

commercial and administrative motorized use of roads all within Stillwater Core. In order to avoid leaving conditions in a manner that would result in long term adverse impacts to existing resources, DNRC is asking operators to work with their respective DNRC Forest Officers to identify those activities that could be expeditiously completed prior to vacating a site to ensure that roads and disturbed ground meet Best Management Practices for Forestry.

- DNRC has been planning 2 sales to sell this fiscal year that would be entirely and partially affected by Stillwater Core – amounting to about 8-9 MMbf.
- **The Order affects DNRC's Annual Sustained Yield (ASY;** amount of timber sold annually). Opening up Stillwater Core increased the ASY from 53.2 to 57.6 MMbf. Now that the Stillwater Core is currently unavailable, this year's ASY will be closer to 53.2 MMbf.
- Sonya Germann, FMB Chief, and other DNRC staff are in constant communications with purchasers, the **Montana Logging Association**, and the **Montana Wood Products Association** as we move forward.
- **Moving Forward:** we have been in communication with the USFWS concerning the next steps. We are working to understand the remand and what steps need to happen next to meet the Judge's requests. DNRC will work diligently with the USFWS to address this as quickly as possible.